No. 1899

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CATHERINE D. STEAD ET AL.,
Complainants and Appellants,

vs.

ISABELLA M. CURTIS ET AL.,
Defendants and Appellees.

THE APPELLANTS' BRIEF

IN SUPPORT OF THEIR MOTION TO VACATE THE JUDGMENT AND THE ORDER DENYING THEIR PETITION FOR REHEARING

APPENDIX

SHOWING THE MOTION AND NOTICE OF HEARING.

HORACE W. PHILBROOK,
Solicitor for Appellants.

WILLIAMS PRINTING COMPANY, SAN FRANCISCO

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CATHERINE D. STEAD, HORACE W. PHILBROOK as Administrator with the Will Annexed of the Estate of Joseph P. Wilson, Deceased, SERENA K. WILSON, ELIZABETH A. BURGAN and FRANKLIN S. BURGAN as Her Husband, ELLWOOD J. WILSON, MARTHA E. DOWELL and GEORGE W. DOWELL as Her Husband, and JOSEPH P. WILSON, JR.,

Complainants and Appellants,

vs.

ISABELLA M. CURTIS and JOHN M. CURTIS as Her Husband, ELIZABETH M. MUIR MUGAN and WILLIAM G. MUGAN as Her Husband, JOHN M. CURTIS, WILLIAM G. MUGAN, THE JACOB Z. DAVIS ESTATE COMPANY, JEAN McGREGOR BOYD, JEAN McGREGOR BOYD as Trustee of the Trust Estate Created by Herself and Alexander Boyd, Deceased, GEORGE DAVIS BOYD, HENRY ST. CLAIR BOYD, EDWARD W. HOPKINS, JOHN F. BOYD, THE ROSENBLATT COMPANY, E. MARTIN & CO., MAURICE ROSENTHAL, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, and THE BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY,

Defendants and Appellees.

THE APPELLANTS' BRIEF

In Support of Their Motion to Vacate the Judgment and the Order Denying Their Petition for Rehearing.

THE MOTION STATED

§ 1. The appellants are respectfully applying by motion for relief as follows: That the herein designated order and also the herein designated judgment of this Court in this cause, made and entered at the present term of this Court, and against the appellants and in favor of the appellees, be vacated and set aside, to-wit: the order made and entered on December 4, 1911, denying the petition of the appellants for a rehearing, and the judgment made and entered on October 2, 1911, declaring the decree appealed from to be affirmed.

§ 2. The said motion and its grounds, and the notice of the hearing thereof, are in writing and have been duly filed, and for further convenience, as shown at the end hereof, in an Appendix.

POINTS INVOLVED

§ 3. Obviously, the following points are involved, arising in the order here stated, viz.: 1. The lawful power of the Court to grant the said relief; and 2. On such power existing, the Court's legal duty to grant the said relief. We therefore show both those points, and in the above order.

FIRST

I

The Court's Lawful Power to Grant the Said Relief

§ 4. Both the judgment and the order which the appellants respectfully ask to have vacated and set aside, were made and entered at the present term of the Court; and the following is an elementary rule of law which has been long settled, viz.:

§ 5. During the entire term of the Court at which they were made or entered, all judgments, decrees and orders of the Court "are in the breast of the Court," are only *coming into being (in fieri),* are absolutely subject to the Court's control; and at any time during such term the Court has full and unquestionable power to vacate and set aside, either of its own motion, or on petition or motion of an injured party, any such judgment, decree, or order. The following are some of the numerous authorities by which this point has been long settled:

Bronson v. *Schulten,* 104 U. S. 410;
Goddard v. *Ordway,* 101 U. S. 745;
Henderson v. *Carbondale &c. Co.,* 140 U. S. 26, 40;
Ex parte Lange, 18 Wall. (U. S.) 163;
Doss v. *Tyack,* 14 How. (U. S.) 297, 313;
Timmons v. *Garrison,* 4 Humph. (Tenn.) 148, 150;
Railroad Company v. *Elder,* 149 Ill. 174;
Niles v. *Parks,* 49 Ohio St. 370;
Clendenning v. *Conrad,* 91 Va. 410, 418;
Townshend v. *Chew,* 31 Md. 247;
Preston v. *McCann,* 77 Md. 30, 33;

Bradley v. *Slater,* 58 Neb. 555;
Bradley v. *Slater,* 55 Neb. 336;
Rich v. *Thornton,* 69 Ala. 473;
Underwood v. *Sledge,* 27 Ark. 295;
Moore v. *Taylor,* 1 Ida. 635;
Gwinn v. *Parker,* 119 N. Car. 19;
Halyburton v. *Carson,* 80 N. Car. 16;
Faircloth v. *Isler,* 76 N. Car. 49, 51;
Ashby v. *Glasgow,* 7 Mo. 320;
Hesse v. *Seyp,* 88 Mo. App. 67, 72;
Woodward v. *Woodward,* 84 Mo. App. 330.

For examples:

In *Bronson* v. *Schulten,* 104 U. S. 410, 415, the Court say:

> "It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them, during the term at which they are rendered or entered of record, and they may then be set aside, vacated, or annulled by that court."

In *Timmons* v. *Garrison,* 4 Humph. (Tenn.) 148, 150, decided in 1843, the Court say:

> "That during the term the judgments and decrees of the court are in the breast of the judge, and may be changed, modified or overruled, has been so often held that it would be a waste of time to expatiate upon the question."

In *Clendenning* v. *Conrad,* 91 Va. 410, 418, the Court say:

> "Until the Court adjourns for the term, no one, unless expressly authorized to do so, can

act under a decree or judgment entered at that term, except at his peril. During the term all the proceedings are in the breast of the Court, and under its control, and liable to be stricken out, altered or amended during the term, and that without notice to the parties." (Citing authorities.)

In *Moore* v. *Taylor*, 1 Ida. 635, the Court say:

"Proceedings during the term are considered only as *in fieri*, and subject to the control of the court, and no rights can be considered as fully settled and determined until they pass beyond the control of the court by the adjournment of the term."

In *Ashby* v. *Glasgow*, 7 Mo. 320, the Court say:

"When a final judgment is rendered in a cause, it may, during the term at which it was rendered, be set aside; for during the term all the proceedings are in the breast of the Court, and they may be altered or vacated as justice requires."

In *Faircloth* v. *Isler*, 76 N. Car. 49, 51, the Court say:

"All the proceedings of the Court are *in fieri*, subject to be amended, modified, or annulled, until the expiration of the term, at which period, in legal contemplation, all the judgments of the Court are delivered."

In *Halyburton* v. *Carson*, 80 N. Car. 16, the Court say:

"It is familiar learning that all the proceedings of a court of record are *in fieri*—under the absolute control of the judge, subject to be amended, modified, or annulled at any time before the expiration of the term in which they are had or done." (Citing authorities.)

In *Woodward* v. *Woodward*, 84 Mo. App. 330, the Court say:

> "It is the well-recognized general rule of law in this and other jurisdictions that all judgments, decrees, and other orders, however conclusive, are under the control of the Court which pronounces them, during the term at which they are rendered or entered of record, and they may then be set aside, vacated, or annulled by that Court. During the term, which in legal contemplation is but a single day, everything is *in fieri.*" (Citing authorities.)

II

Courts of Equity Possess the Same Power

§ 6. Courts of equity, as fully as courts of common law, possess the power to vacate their decrees or orders at any time during the term at which such decrees or orders are made or entered. This is self-evident; and the following are among the numerous authorities by which it is settled:

Doss v. *Tyack,* 14 How. (U. S.) 297, 312;
Goddard v. *Ordway,* 101 U. S. 745;
Henderson v. *Carbondale &c. Co.,* 140 U. S. 26, 40;
Burch v. *Scott,* 1 Bland (Md.) 112, 120;
Thruston v. *Devecmon,* 30 Md. 217;
Pattison v. *Josselyn,* 43 Miss. 373, 378;
Clendenning v. *Conrad,* 91 Va. 410;
Kelty v. *High,* 29 W. Va. 381;
Bishop v. *Aborn,* 16 R. I. 568.

For examples:

In *Burch* v. *Scott,* 1 Bland (Md.) 112, 120, the Court say:

> "It has been the long established usage of the Court of Chancery, to consider all its orders and decrees as completely within its control and open to be altered, revised, or revoked during the whole term at which they are passed, on motion or by petition."

In *Pattison* v. *Josselyn,* 43 Miss. 373, 378, the Court say:

> "It can not be controverted that the Chancery Court has the discretion, at the same term at which a final decree is pronounced, for good cause, to alter or modify it or to set it aside altogether."

III

Appellate Courts Possess the Same Power

§ 7. Appellate courts, as fully as any other, possess the lawful power to vacate their judgments, decrees, and orders, at any time during the term at which such judgments, decrees, or orders are made or entered. This also is self-evident; and the following are among the authorities by which it is settled:

Goddard v. *Ordway,* 101 U. S. 745;
McRaven v. *McGuire,* 9 Sm. & M. (Miss.) 35;
Faircloth v. *Isler,* 76 N. Car. 49, 51 (quoted in § 5 above).

In *McRaven* v. *McGuire,* 9 Sm. & M. 35, for example, the point decided is thus stated in the syllabus:

> "The judgments of the high court of errors and appeals are, during the term at which they

> are rendered, subject to the control of the Court; and the individual opinions of one of the judges may be recalled and changed, if he becomes satisfied of error."

IV

The Court May Properly Exercise Such Power Without Notice

§ 8. While appellants' present motion is made on notice duly given to the appellees, yet, as illustrating the character and extent of the Court's power to vacate and set aside its judgments, decrees, or orders at any time during the term at which they are made, it appears that such power may properly be exercised without notice. This is *held,* in the following cases:

Rich v. *Thornton,* 69 Ala. 473;
Smith v. *Robinson,* 11 Ala. 270;
Clendenning v. *Conrad,* 91 Va. 410, 418;
Hesse v. *Seyp,* 84 Mo. App. 67, 72.

V

The Motion to Vacate the Judgment and the Order May Be Granted at Either the Present or a Later Term

§ 9. Since the appellants' present motion to vacate and set aside the judgment and the order denying a rehearing is entered at the present term, it may properly be granted at either the present or at a later term. This also is self-evident. The following are some of the authorities by which it is settled:

Goddard v. *Ordway*, 101 U. S. 745;
Railroad Company v. *Elder*, 149 Ill. 174;
Niles v. *Parks*, 49 Ohio St. 370;
Preston v. *McCann*, 77 Md. 30, 33.

VI

Such Relief Grants a Rehearing

§ 10. It is self-evident that the effect of granting the relief sought by the present motion will simply be to grant a rehearing of the cause.

In *Underwood* v. *Sledge*, 27 Ark. 295, the Court say:

> "It is well settled that a Court has control over its orders and judgments during the term at which they are made, and, for sufficient cause, may modify or set them aside * *; and when an order or judgment of a court is set aside, at the same term of the court at which it was rendered, the whole suit or matter stands precisely as if no such consideration had been had or entered of record, and all parties interested are remitted back to such rights and remedies as they had before the making of the orders or judgments so vacated."

SECOND

The Court's Legal Duty to Grant the Said Relief

I

The Order Denying Appellants' Petition for Rehearing Expressly Finds and Adjudges that Said Petition Ought to Be Granted

§ 11. The said order denying appellants' petition for a rehearing, omitting only the title of the Court and cause, is as follows:

> "Order Denying Petition for Rehearing.
>
> "On consideration of the petition, filed on the 31st day of October, A. D. 1911, on behalf of the appellants for a Rehearing of the above entitled cause, and the Court being fully advised in the premises, and in accordance with the opinion of this Court this day rendered and filed, it is ordered that the said Petition for a Rehearing be, and hereby is denied."
>
> —*The Court's Minutes of Dec. 4, 1911.*

§ 12. Observe, now, the following: The order (§ 11 above) *refers expressly* to "the petition, filed on the 31st day of October, A. D. 1911, on behalf of the appellants for a Rehearing of the above entitled cause," and also *refers expressly* to "the opinion of this Court this day rendered and filed," and also *says expressly* that it is the Court's *intention* to make the order *"in accordance with the opinion of this Court this day rendered and filed."*

§ 13. Turning, then, to that "petition filed on the 31st day of October, A. D. 1911," etc.,. and to that "opinion of this Court this day (Dec. 4, 1911) rendered and filed," we find the following, to-wit: The appellants' said petition for a rehearing properly sets forth and demonstrates, among other things—and the said "opinion of this Court" *expressly finds and declares it to be all true*—that this Court, in rendering the said judgment on October 2, 1911, *wholly overlooked and utterly forgot three of the five independent grounds of this suit that were properly specified and submitted for decision by the appellants, and also wholly overlooked and utterly forgot the entire argument of said three overlooked grounds by appellants' counsel,* and, further, that *every one of said overlooked grounds is worthy of consideration and, if to be decided as appellants had claimed they respectively ought to be decided, would entitle the appellants to the recovery of all the immense property for which they sue in this cause.* The said "opinion of this Court" may be conveniently seen in—

Stead v. *Curtis,* 191 Fed. Rep. 529-542.

§ 14. The said order denying appellants' petition for rehearing therefore *expressly finds and adjudges that the said petition ought to be granted.* This we will now prove.

II

The Court's Authority to Act on Petitions for Rehearing Is Not Arbitrary

§ 15. The following must command universal assent, and is settled law: The authority of a Court to act on

petitions for rehearing is not arbitrary, but is to be exercised with legal discretion, that is to say, in subordination to legal principles and rules. Here we cite the following:

Railway Co. v. *County Railway Co.*, 26 Fed. 411;
Lee v. *Bude &c. Ry Co.*, L. R. 6 C. P. 576, 580;
Tug &c. Co. v. *Circuit Judge*, 75 Mich. 360, 362;
Morgan v. *Morgan*, L. R. 1 P. & D. 647;
Rook's Case, 5 Coke, 99 (b);
Coke's Institutes on 29th Chapter of Magna Charta, p. 50;
Rex v. *Wilkes*, 4 Burr. 2539;
Attorney General v. *Downing*, Wilm. 1, 17;
Osborn v. *U. S. Bank*, 9 Wheat. 866;
Tripp v. *Cook*, 26 Wend. (N. Y.) 143, 152;
Faber v. *Bruner*, 13 Mo. 543;
Dooley v. *Barker*, 2 Mo. App. 328;
Norris v. *Clinkscales*, 47 S. Car. 498;
Abbott v. *L'Hommedieu*, 10 W. Va. 700;
Bailey v. *Taafe*, 29 Cal. 423.

For examples:

In *Railway Co.* v. *County Railway Co.*, 26 Fed. 411, the Court say:

> "The application for a re-argument, it is true, is addressed to the discretion of the Court. The exercise of such discretion, however, is not wilful, but is governed and determined by certain well-established principles. * *
>
> "The grounds on which courts ordinarily listen to such applications are stated by the Court of Appeals of New York in *Marine Nat.*

Bank v. *City Nat. Bank,* 59 N. Y. 73. They are: (1) upon all allegations that any question decisive of the case, and duly submitted by counsel, has been overlooked by the Court; or (2) that the decision," etc.

In *Lee* v. *Bude &c. Ry. Co.,* L. R. 6 C. P. 576, 580, the Court say:

"It was intended that the Court should exercise a discretion, that is, a judicial discretion regulated according to known rules of law. That is the meaning of the expression as usually found in the books."

In *Rex* v. *Wilkes,* 4 Burr. 2539, the Court say, by Lord Mansfield:

"But *discretion,* when applied to a court of justice, means *sound* discretion *guided by law.* It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful; but legal and regular."

Sir Edward Coke, in the *Institutes,* treating of the 29th chapter of Magna Charta, says:

"The law is called *rectum* (straight or right), because it discovereth what is tort, crooked, of wrong, for as right signifieth law, so tort, crooked or wrong, signifieth injury. * * Hereby the crooked cord of what is called discretion appeareth to be unlawful, unless you take it as it ought to be, Discretion is to discern *by law,* what is just."

In *Rooke's Case,* 5 Coke 99 (b), the Court say:

"And notwithstanding the words of the commission give authority to the commissioners

> to do according to their *discretions*, yet their proceeding ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colorable glosses and pretenses, and not to do according to their wills and private affections."

In *Osborn* v. *United States Bank,* 9 Wheat. (22 U. S.) 866, the Court say, by Chief Justice Marshall:

> "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it."

In Tug &c. Co. v. *Circuit Judge,* 75 Mich. 360, 362, in ordering a mandamus to compel the granting of a new trial, the Court say:

> "It is said that a new trial in this case was not a matter of right, but was within the discretionary power of the Circuit Court; that the Circuit Judge exercised that discretion, and that this Court can not review it. * *
>
> "The discretion vested in the Circuit Court in this matter is a legal one, as all the authorities concede. Now, what is understood by legal discretion? Certainly it is not an arbitrary one. When exercised arbitrarily by a court, it becomes an abuse of legal discretion. It must be conceded that the Circuit Court has no right or power to exercise its discretion in any such way. * *
>
> "A legal discretion is one that is regulated

and governed by well-known and established principles of law. It can never be used or invoked to destroy nor to deprive a party of his property rights. Those are absolute, and no court is vested with the power to destroy these, nor to deprive a party of them, except as public necessity may require; and that is not this case.

"Legal discretion can only be exercised in securing to a party his absolute rights and in their protection in some way; and when the discretion of a court is used for any other purpose, it becomes arbitrary and oppressive, and can never be regarded when so used as anything but an abuse of discretion, which is itself a violation of the law, both tyrannical and intolerable."

III

By Rendering a Portion of the Decision on Appellants' Petition for Rehearing, the Court Has Denied to the Appellants a Hearing of the Cause

§ 16. As already pointed out (§§ 11-13), the Court, in its said order denying the appellants' petition for a rehearing, has expressly found and declared—and such also is the actual fact—that *this Court,* in rendering its judgment (on October 2, 1911), *wholly overlooked and forgot three of the five independent grounds of this suit and the entire argument of the said overlooked grounds by the appellants' counsel.*

§ 17. What else did the Court do in the case on December 4, 1911? The Court then rendered on that day *a supplemental decision,* in which the Court has purported to take up and decide the grounds of this suit that

were left unconsidered in rendering the judgment; and in so doing, this United States Circuit Court of Appeals has denied to the appellants a hearing of their cause. This we will now prove.

§ 18. As hereinafter shown (§ 30), all the authorities agree that, in appellate courts, a defeated party is entitled to a rehearing on showing that the Court, in rendering the judgment, overlooked any decisive ground which such party duly submitted for decision.

§ 19. That unanimous agreement of the authorities plainly indicates that such settled rule of law is an expression of a fundamental principle of natural justice. That principle is very obvious. A court's rendition of its judgment is necessarily a deliberate act; and hence wherever such judgment has been rendered upon wholly overlooking and ignoring any material ground and after having forgotten even that such a ground was argued or submitted for decision, although such ground is decisive of the case and the defeated party actually invoked such ground and argued it and submitted it for decision, —in every such case the judgment rendered has necessarily denied to the defeated party a hearing of his cause.

§ 20. In this particular case, the appellants have never, in any degree whatever, waived a hearing. On the contrary, the appellants' counsel, on March 3, 1911—six months prior to the said wrongful rendition of judgment—orally argued to the Court the entire case as fully as he was allowed to do.

An Appellate Court's Judgment is Wrongful and Void When Made on Denial of Oral Argument

§ 21. As just pointed out (§ 19), the said order made on December 4, 1911, denying the petition of the appellants for a rehearing, has expressly admitted and conclusively established the fact that, as regards three of the five independent grounds of this suit, the said judgment of this Court against the appellants, rendered on October 2, 1911, was rendered without allowing the appellants a hearing.

§ 22. Therefore there applies to the case a fundamental principle of universal operation, and the following settled rule of law that is an expression of that principle: Any judgment of a court made against a party without allowing him a hearing, is wrongful and void. This rule applies to judgments of appellate courts, and, by virtue of it, any judgment of an appellate court made against a party without allowing him an *oral argument* of the grounds of his case, is arbitrary, wrongful, and void. It will be sufficient to cite the following authorities:

Queen v. *Archbishop of Canterbury*, 1 Ellis & Ellis 545;

Capel v. *Child*, 2 Cr. & J. 558;

Luco v. *DeToro*, 88 Cal. 27;

Railroad Co. v. *Townsite Co.*, 42 Kan. 104;

De Votie v. *McGerr*, 14 Colo. 577;

Brown v. *Hummel*, 6 Pa. St. 91;

State v. *Beverman*, 59 Kan. 591;

Meredeth v. *People*, 84 Ill. 482;

Thompson v. *People*, 144 Ill. 378;
O'Brien v. *People*, 17 Colo. 563;
Ellerbe v. *State*, 75 Miss. 532;
Hovey v. *Elliott*, 167 U. S. 413.

For examples:

Queen v. *Archbishop of Canterbury*, 1 Ellis & Ellis 545, was a suit for a mandamus to compel the Archbishop to hear a case that had been appealed to him from a lower tribunal. The appeal had been taken in writing, and the appellant had filed with the Archbishop, with the appeal, a written statement of the grounds of the appeal, and the Archbishop, upon a careful consideration of the record, including the said written grounds filed by the appellant, had decided the case against the appellant, but without allowing him an oral hearing.

The Court *held* that, *because the Archbishop had denied the appellant a hearing*, his judgment was absolutely void, and granted the mandamus prayed for. In so deciding, the Court say:

(By Lord Campbell, C. J.)

> "No doubt the Archbishop acted most conscientiously, but we all think he has taken an erroneous view of the law. He was bound to hear the appellant, and he has not heard him. It is one of the first principles of justice that no man should be condemned without being heard. We do not say whether the Archbishop's decision was right or wrong. We say only that he has not heard the petitioner. The appellant here has not been heard. Without any communication with him, his judge decides against him. We think the mandamus

to hear the appeal must go, as in our opinion there has been no hearing."

(By Wightman, J.)

"It is not our duty to give an opinion upon the merits of the petition: We merely say that *ex debito justiciae* every one has a right to be heard before he is condemned."

(By Crompton, J.)

"I have not been able to entertain any doubt that we are bound to issue this mandamus. Where a statute of this kind gives an appeal, it gives, by implication, a right to be heard upon the appeal. Even if the Archbishop should direct that all appeals to him must be in writing, still he must hear the appellant upon those written appeals. Here the appeal has not been heard, and the mandamus must issue to the Archbishop to hear it."

(By Hill, J.)

"This mandamus is for an inquiry to be made by the Archbishop. The question for us is, is the Archbishop, under the statute, bound to hear the appeal, and if so, what is a hearing? What does the law require in such a case? Invariably, that the parties who are to be liable to a judgment shall be heard. This is a principle, which has been laid down in numerous decisions in all the courts. * * When we look at the petition here, we find that the appellant denies that his admissions were to the effect stated by the Bishop. That is the

> question which he submits to the judgment of the Archbishop. He has a right to be heard before the Archbishop to argue that question; and the Archbishop can not give judgment until that question has been argued before him."

In *Capel* v. *Child*, 2 Cr. & J. 558, a statute expressly authorized a Bishop, whenever certain facts "shall appear to the satisfaction of any Bishop, either *of his own knowledge*," etc., to take away from the vicar certain of his income and to employ it for other uses. The Bishop, claiming to proceed under that statute, had made an order which expressly recited that the requisite facts appeared to him *"of his own knowledge,"* and thereupon diverted from the vicar certain of his income. But the Bishop had not given to the vicar an opportunity of a hearing; and the Court therefore held the Bishop's order to be void. In so deciding, the Court say:

(By Lord Lyndhurst, C. B.)

> "According to every principle of law and equity, such judgment could not be pronounced, or, if pronounced, could not for a moment be sustained, unless the party (the vicar) in the first instance had the opportunity of being heard in his defense, which in this case he had not."

(And by Bayley, B.)

> "When the Bishop proceeds on his own knowledge, I am of opinion also that it can not possibly, and within the meaning of this Act, appear to the satisfaction of the Bishop, and *'of his own knowledge,'* unless he gives the party an opportunity of being heard, in

answer to that which the Bishop states *on his own knowledge* to be the foundation on which he proceeds. Is it not a common principle in every case which has in itself the character of a judicial proceeding, that the party against whom the judgment is to operate should have an opportunity of being heard?"

In *Hovey* v. *Elliott*, 167 U. S. 413, the Court say:

"The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever, is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

In *Brown* v. *Hummel*, 6 Pa. St. 91, the Court say:

"The first judgment on earth was on summons and hearing. Where art thou, Adam? and, Hast thou eaten? etc., preceded the ejectment of Adam and Eve from their beautiful inheritance, the Garden of Eden. And the proudest legislator may learn wisdom from such an example."

In *Rex* v. *Chancellor*, 1 Str. 565 (quoted and adopted by the Court in *Cooper* v. *Board*, 108 Eng. C. L. R. 181, and also by the Court in *Railroad Tax Cases*, 13 Fed. 765), the Court say (by Fortesque, J.):

"The objection of a want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defense. I remember to have heard it observed by a very learned man upon such an occasion,

> that even God himself did not pass sentence upon Adam, before he was called upon to make his defense. 'Adam, where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also."

§ 23. Even Omniscience, then, does not pass judgment against a human being without allowing him a prior hearing. And that passage of the Book of Genesis expresses also the spontaneous and universal sentiment of every sane human being that has ever existed. Every judge on the face of the earth may well "learn wisdom from such an example."

The Fact That a Further Appeal May Be Taken Does Not Vary the Case

§ 24. It is also plain that it is no answer to the objection to say that a further appeal to another Court may be taken.

In *Capel* v. *Child*, 2 Cr. & J. 558, for instance, the Court say (by Lord Lyndhurst, C. B.):

> "Then it was said, in answer to the argument urged at the bar, that the party had a right to appeal to the Archbishop. I apprehend the right to appeal to the Archbishop makes no difference in this case. Where there is an authority to pronounce a judgment, and an appeal is given from that judgment when it is pronounced, the party against whom the judgment is pronounced has a right to be heard on the original judgment; he has a right to be heard before the original judgment is pronounced, for the purpose of preventing that judgment from being pronounced; and the circumstance of its (the right of appeal) having been given, makes, in that respect, as I apprehend, no difference whatever."

The Act of Congress Creating the Court Expressly Gives the Right to Argue Orally the Entire Case

§ 25. The Act of Congress by which this Court has been created, expressly directs, in the passage quoted in § 26 *post*, that the court shall "establish all rules and regulations for the conduct of the business of the Court," etc. And thereupon, long prior to the commencement of this suit, this Court duly enacted a *rule*, of which the following is a part (Rule 25):

"ORAL ARGUMENTS.

"1. The plaintiff in error or appellant shall be entitled to open and conclude the argument of the case."

IV

THIS UNITED STATES CIRCUIT COURT OF APPEALS HAS DENIED TO THE APPELLANTS THE RIGHT TO PETITION FOR REHEARING

§ 26. The Act of Congress which has created this Court (Act of March 3, 1891, sec. 2: 26 Stats. 826) provides:

"The Court shall have power to establish all rules and regulations for the conduct of the business of the Court within its jurisdiction as conferred by law."

§ 27. And the Court thereupon, and prior to the present suit, has enacted *a rule*, as follows (Rule 29):

"A petition for rehearing may be presented within thirty days after judgment."

§ 28. Take, now, the fact stated in § 17 above. What, then, is the case on this point. The Court rendered and entered its judgment on October 2, 1911, and *at that time*, decided only two of the five grounds of the suit. By the Rule just quoted, the right of the appellants to petition for a rehearing was made to expire on November 1, 1911. Afterward, on December 4, 1911, without even the pretense of giving opportunity for a hearing, the Court rendered *a supplemental decision,* deciding or purporting to decide grounds of the suit that were previously overlooked and left undecided. In short, *the Court deliberately and wrongfully withheld, kept back, three-fifths of the decision until after the expiration of the time within which the appellants were allowed to petition for a rehearing.*

§ 29. The Court has, therefore, wrongfully deprived the appellants of the right to petition for a rehearing; and that right of which the appellants have thus been wrongfully deprived, is an important right given *by law,* that is, by a *rule* enacted by the Court under the express direction of the law that created the Court.

V

The Appellants' Right to a Rehearing Is Established by the Very Order Denying the Rehearing

§ 30. It is fully proved, in points "II," "III," and "IV" above (§§ 15-29), that a petitioner for a rehearing is of right entitled to have his petition granted when he shows, in his petition, that the Court, in rendering the

judgment against him, overlooked any ground or question that was decisive of the case and that he duly submitted for decision. And that such is the settled rule, is shown by the unanimous agreement of the authorities, some of which are the following:

2 Cyc. 215;
18 Enc. Pl. & Pr. 35;
Railway Co. v. *County Railway Co.,* 26 Fed. 411;
Kirby v. *Telegraph Co.,* 4 S. Dak. 439;
Smith v. *Walker,* 57 Mich. 488;
Hardin v. *Melton,* 28 S. Car. 38, 49;
Mount v. *Mitchell,* 32 N. Y. 702;
Fosdick v. *Hempstead,* 126 N. Y. 652;
Haywood v. *Dawes,* 81 N. Car. 9;
Andrews v. *Crenshaw,* 4 Heisk. (Tenn.) 151;
State v. *Eaton,* 6 Kan. App. 95;
Rule of Court, 116 Mo., Appendix, p. 4;
Davis v. *Clark,* 2 Mont. 394;
Derby v. *Gallup,* 5 Minn. 119;
Hintrager v. *Hennessy,* 46 Ia. 605;
Brown v. *Pickard,* 4 Utah 294;
Railroad Co. v. *Gibbes,* 24 S. Car. 61;
Frost v. *Weatherbee,* 23 S. Car. 370.

For examples:

In *2 Cyc.* 215, in the treatise on *Appeal and Error*, the text states the rule of law as without exception and as follows:

> "*Points and Authorities Overlooked.* A rehearing will be granted if the Court has overlooked material points or decisive authorities duly submitted by counsel." (Citing authorities.)

In the *Encyc. of Pl. & Pr.*, vol. 18, p. 35, in the treatise on *Rehearing*, the text also states the rule of law as without exception and as follows:

> "A rehearing will be granted where it is shown that some question decisive of the case and duly submitted by counsel has been overlooked by the Court." (Citing authorities.)

Railway Company v. *County Railway Company*, 28 Fed. Rep. 411, directly to the point, is quoted in § 15 above.

In *Smith* v. *Walker*, 57 Mich. 488, the Court say:

> "The Court will always regard a motion for rehearing with favor, which will call our attention to something contained in the record or briefs of counsel that has been inadvertently or otherwise overlooked or omitted, which is material to be considered in making a proper disposition of the case, or which will challenge our attention to a misapplication of the law."

In *Kirby* v. *Telegraph Company*, 4 S. Dak. 439, in granting a rehearing, the Court say:

> "But appellant's counsel calls our attention to another question, which was alluded to in the oral argument, and but lightly referred to in his brief, which may have some material bearing upon the merits of the case, and which was not considered by the Court. The question is * * (The Court here state the question.) Counsel for appellant contend * * (The Court here state the contention.), and our attention is called to a large number of decisions in support of this contention. In view, therefore, of the great importance of the case, * * and in order that a full determination may be had of all questions in controversy in this action, we shall grant a rehearing as prayed for."

In *Hardin* v. *Melton,* 28 S. Car. 38, 49, the Court say:

> "To entitle a party to a rehearing after judgment pronounced by this Court, it should appear in the petition filed for that purpose that this Court overlooked some fact or some question of law material to the case, as presented by the appeal."

In *Marine Nat. Bank* v. *City Nat. Bank,* 59 N. Y. 73, the Court quote and adopt the language of the Court in *Mount* v. *Mitchell,* 32 N. Y. 72, as follows:

> "Motions for re-argument should be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the Court," etc.

In *Fosdick* v. *Hempstead,* 126 N. Y. 652, the Court again quote and re-affirm the same language, and say concerning it:

> "Many years ago the Court announced the rule that should govern in this class of motions."

The Right to Rehearing Does Not Require Proof That the Former Decision Was Wrong

§ 31. To entitle a party to a rehearing, it is unnecessary for him to demonstrate that the former decision was wrong. This is shown in §§ 22, 23 above, and in the language of the decisions quoted in § 22 above; and it is proved also by the general course of all appellate courts, where it appears that the courts, after granting the rehearing, sometimes re-affirm the former decision, and sometimes reverse it. In *Morrow* v. *Weed,* 4 Ia. 123, speaking on this point, the Court say:

> "In this case a rehearing was granted upon the petition of the plaintiff and appellee. The granting a rehearing in our present practice is now but a re-argument and reconsideration, on the petition of the party, or when the Court itself desires it. The cause is set down, technically for re-argument. In neither case does it necessarily imply that the Court is convinced that it has fallen into error. In the present cause, the rehearing was granted for several reasons. * * We have been willing, therefore, to reconsider the cause—to look at it more in detail, and see if we have fallen into error."

VI

The Said Judgment and Order of This Court Have Throughout Denied and Overthrown Both Justice and Law.

§ 32. In the appellants' petition for rehearing filed on October 31, 1911, and above mentioned, this is expressly made the main ground and is expressly pointed out and proved. The supplemental decision which was thereupon made on December 4, 1911, and is above mentioned, both omits to answer that ground and is a further example of it. The very fact that such ground exists—that this United States Circuit Court of Appeals has in this cause fundamentally and throughout and in every particular, precisely as did the Court below, denied to the complainants and appellants both justice and the law—forbids them, in addressing the very Court that has done such wrong, to go into any further detail of proof of it. The principle here involved was stated by Pascal, in the twelfth *Provincial Letter,* as follows:

> "It is a strange and tedious war when violence attempts to vanquish truth. All the efforts

> of violence can not weaken truth, and only serve to give it fresh vigor. All the lights of truth can not arrest violence, and only serve to exasperate it. When force meets force, the weaker must succumb to the stronger; when argument is opposed to argument, the solid and the convincing triumphs over the empty and the false; but violence and verity can make no impression on each other.
>
> "Let none suppose, however, that the two are, therefore, equal to each other; for there is this vast difference between them, that violence has only a certain course to run, limited by the appointment of Heaven, which overrules its effects to the glory of the truth which it assails; whereas verity endures forever, and eventually triumphs over its enemies, being eternal and almighty as God Himself."

§ 33. The case of these complainants and appellants, set forth in their bill of complaint, is in the highest degree a just and righteous cause; and on the facts properly set forth in that bill—and which constitute the case before this Court—the law clearly and beyond any room for doubt entitles these appellants to the judgment of this Court in their favor, so as to give them, by means of this suit, the recovery of their said property of upwards of three million dollars in amount and value; and all this is fully shown and proved and step by step demonstrated in the appellants' Brief which was filed in compliance with the command of Rule 24 of the Court. These appellants, in asking for such judgment in their favor, have asked for only their plainly just and righteous and plainly lawful rights, and, in their said Brief, have made their said rights plain, manifest, and indisputable; and any lawful and fair treatment of the case as it was presented to this

Court will so demonstrate. In this case no doubtful or difficult problem has been presented to this Court for solution, nor has any problem been presented, nor is any involved, that a fair mind can decide against these appellants. But, by the judgment and the order denying a rehearing, both of which the appellants here ask to have vacated and set aside, and by the two opinions of this Court, one filed with the said judgment and the other with the said order, and on respectively October 2, 1911, and December 4, 1911, all lawful treatment of the case has been refused and denied, and, in lieu of lawful treatment, this cause has been subjected to a treatment unjust, unlawful, and unrighteous in a degree and of a kind that would beat down and destroy any cause and any principle or provision of law—that is, under which the most righteous cause and the clearest and strongest legal right would have no chance whatever. The argument of this case for the complainants, as given in their said Brief, and as given before the Court orally on March 3, 1911, neither has been nor can be fairly, lawfully, or justly met. In short, the only result that the appellants have obtained by their appeal has been to suffer from this Court a more deliberate infliction of the same wrongs that were inflicted upon them by former Judge Cornelius H. Hanford in the Court below. These appellants are native born citizens of the United States; they have the right to be fairly treated and to have their cause fairly treated in and by this Court of the United States; and they here claim and demand that right.

The complainants and appellants respectfully demand the relief prayed for by the motion filed herewith, and stated also in § 1 above.

HORACE W. PHILBROOK,
Solicitor for Appellants.

San Francisco, Cal.,
August, 1912.

CERTIFICATE

I certify that the accompanying motion of the appellants, above stated, and the foregoing brief in support thereof, are well founded, and that neither the said motion nor the said brief is interposed for delay.

HORACE W. PHILBROOK,
Counsel for Appellants.

APPENDIX

The following, omitting only the title of the Court and of the cause, is a copy of the motion (and notice of hearing) referred to and supported in the foregoing brief:

(Title of Court and Cause.)

MOTION BY APPELLANTS TO VACATE THE JUDGMENT AND THE ORDER DENYING APPELLANTS' PETITION FOR REHEARING; AND NOTICE OF HEARING.

To the United States Circuit Court of Appeals for the Ninth Circuit and to the Judges Thereof; and to the Appellees and Their Solicitors:

The appellants respectfully move that the hereinafter designated order and also the hereinafter designated judgment of this Court in this cause, made and entered at its present term and against the appellants and in favor of the appellees, be vacated and set aside, to-wit: the order made and entered on the 4th day of December, 1911, denying the petition of appellants for a rehearing, and the judgment made and entered on the 2nd day of October, 1911, declaring the decree appealed from to be affirmed.

This motion is made on all and singular the following grounds:

1

The appellants are suing for the recovery of their property—all properly designated in their bill of complaint and of the amount and value of nearly three and one-half million dollars ($3,483,912.00), and all of which has been wrongfully seized and withheld by the appellees by means of certain void, fraudulent, and otherwise

wrongful pretended probate proceedings and judgments of the Superior Court of the State of California in and for San Francisco. On the said pretended probate proceedings and judgments being found either void or voidable by this suit, the appellants are of right and justly entitled to recover their said property by this suit; and they have properly shown and claimed on the record, and have properly shown and fully proved in their Brief filed and served in compliance with Rule 24 of the Court, five independent grounds on every one of which and by virtue of the law, the said pretended probate proceedings and judgments ought to be by the Court in this suit declared void and set aside and the appellants' said property restored to them; and every one of said grounds is by itself sufficient to such end. The appellants by their counsel orally argued all the said grounds to this Court on the 3rd day of March, 1911, and on that day submitted this cause and the said grounds to this Court for decision and judgment. Thereupon, this Court, in rendering the said judgment against the appellants and in favor of the appellees on October 2, 1911, filed a written opinion which purported to set forth the grounds of said judgment; and the said written opinion is throughout and in every particular and in the highest degree unjust and unfair. Also, in the making of said written opinion and in the rendition of said judgment, three of the said five grounds of this suit and the entire argument thereof made on the part of the appellants, were by the Court wholly overlooked and forgotten and left unmentioned. Thereupon, on October 31, 1911, the appellants filed their said petition for rehearing, and therein properly complained of and showed the injustice

and unfairness of said judgment and also complained and showed that, as above mentioned, the Court had, in the rendition of said judgment, wholly overlooked and forgotten three of the said five grounds of the suit and the said entire argument thereof, and prayed to have the said wrongful judgment set aside and to be allowed a hearing of their cause. Thereupon, without allowing the appellants any opportunity for a hearing, the Court, on December 4, 1911, made and entered the said order declaring said petition to be denied, and in the said order and without controverting any of the grounds of said petition, has expressly found and declared that, as hereinbefore stated, the Court had, in rendering said judgment, wholly overlooked and forgotten and left unmentioned three of the five fundamental grounds of the suit, and in the said order and on its face has also expressly found and declared that each of said three overlooked grounds is a ground decisive of the case and worthy to be considered and decided, and, instead of allowing to the appellants a hearing, has, in denial of any hearing or judicial consideration, set forth against the appellants and in favor of the appellees an utterly unfair and unjust discussion and purported decision of the said three overlooked grounds. And therefore the said order denying a rehearing expressly recites on its face and establishes that the appellants' said petition for rehearing ought not to be denied and ought to be granted.

2

The said judgment and the said order denying a rehearing have been made in violation of law and justice, have denied to the appellants a hearing of their cause,

and have denied to them that fair and just consideration of their cause that is absolutely essential to the fundamental conception of a court of justice.

3

The said judgment and order of this Court are but a continuation of the extreme and gross injustice that was done to the complainants (these appellants) by the Court from which the appeal was taken. In that Court, the Court below, this suit was regularly heard and fully argued before Judge Edward S. Farrington, there regularly presiding, and submitted to him for decision and judgment, and was thereupon held under consideration by him for more than one year. When the said Judge Farrington was about to render decision, Circuit Judge William W. Morrow, one of the judges of this Court, suddenly and without cause and without the consent of any of these appellants, interposed on February 5, 1910, and ordered this suit taken away from Judge Farrington, and called in former Judge Cornelius H. Hanford, of Seattle, and assigned him to dispose of this suit on February 14, 1910. Thereupon said Cornelius H. Hanford sat as judge of the Court below on February 14, 1910, for the purpose of disposing of this suit, and then immediately made the fact manifest and indisputable that he then sat as judge of this case, not to give it any judicial consideration, but to deny to the complainants both justice and law and to strike down their cause. This the said Judge Cornelius H. Hanford then did by forthwith vacating, on February 14, 1910, an order which the said Judge Farrington had made in this suit and by which said order certain defendants (appellees here) were re-

strained from prosecuting, during the pendency of this suit, a later suit which they had commenced against these appellants in the said Superior Court of the State of California on the same subject matter that is involved in this suit. And immediately thereupon the said Judge Cornelius H. Hanford arbitrarily denied to these complainants any hearing of this suit, and thereupon, without allowing any hearing, entered a decree dismissing this suit on February 19, 1910. It is from that wrongful decree that this suit has been appealed by these appellants to this Court.

This motion is made on all the papers, records, and files of this Court in this cause.

Notice is here given that this motion will be brought on for hearing in the Court Room of ~~the~~ said United States Circuit Court of Appeals in San Francisco, on the 4th day of September, 1912, at the opening of the said Court, or as soon thereafter as counsel can be heard.

This motion is supported by a printed brief of points and authorities served herewith.

I certify that this motion is well founded and is not interposed for delay.

HORACE W. PHILBROOK,
Solicitor for Appellants.

(Filed and served in San Francisco on August 27, 1912.)